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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-7

TO: The Commission

Comments of the National Association of Broadcasters

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Summary

In the more than thirty years since the FCC last examined the television duopoly rule, the video market "has undergone a breathtaking transformation." In light of those changes, NAB urges the Commission to deregulate ownership of broadcasting stations broadly.

NAB supports the Commission's proposal to revise the duopoly rule to apply only to stations in the same DMA or where two stations' Grade A signals overlap.

The Commission should revise the television duopoly rule to permit ownership of two UHF stations or one UHF and one VHF station in a market. Since the duopoly rule was imposed, numerous competitors to television stations have developed, none of which are subject to duopoly restrictions, and all of which offer multiple channels to consumers. Increasing broadcast ownership in these conditions could not have any significant impact on the Commission's twin concerns of competition and diversity, for there are many sources of programming and advertising in the market. Further, keeping television broadcasters as single-channel outlets in a multi-channel world will, in the long run, threaten their ability to serve the public. Congress recognized these developments and signaled its intention that the FCC substantially modify the duopoly rule.

Permitting common ownership of two stations will indeed strengthen competition and diversity by increasing the number of strong stations competing for viewers and advertisers. Changing the duopoly rule will increase the amount and quality of programming to the benefit of the public.

The Commission should also repeal the one-to-a-market rule. Congress and the Commission have abandoned the notion that greater diversity of ownership is always better that was the foundation of the rule. In practice, the rule advances no discernible public interest, but

instead imposes high costs on licensees and the Commission. It creates anomalous industry structures and prevents stations from achieving efficiencies that would benefit the public.

Finally, if the Commission does not permit some or all existing television LMAs to be converted to full ownership, it should grandfather them, as well as allow them to be renewed and transferred. The Telecommunications Act provided for grandfathering of existing LMAs, and the Commission's proposal to do so only for the current contract term reads Congressional intent too narrowly. Further, existing television LMAs have strongly benefitted the public, resulting in new transmission facilities, expanded news and other programming, and increased service to the public on the stations involved in LMAs. The Commission should not jeopardize these benefits by requiring that existing LMAs be terminated.

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TO: The Commission

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The National Association of Broadcasters ("NAB")[1] submits these comments on the Commission's *Second Further Notice of Proposed Rule Making*. The Commission seeks comment on a broad range of issues affecting its regulation of ownership of television and radio stations. In considering the Commission's proposals, the NAB Television Board of Directors pointed out that "[i]n the Telecommunications Act, Congress recognized that 'the local television marketplace has undergone a breathtaking transformation.'"[2] The Television Board concluded that "if local television stations are to continue to play the unique role they have in their communities, the FCC's outdated local television ownership rules must be revised." The NAB

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1 NAB is a nonprofit incorporated association of broadcast stations and networks. NAB serves and represents the American broadcasting industry.

2 Statement of the NAB Television Board of Directors (Jan. 28, 1997), *quoting* 142 CONG. REC. H1163 (daily ed. Feb. 1, 1996)(Statement of Congressman Stearns).

therefore supports broad deregulation of station ownership to reflect the overwhelming changes in the marketplace that have and will occur.

I. The Commission Should Adopt its "DMA/Grade A Contour" Proposal to Narrow the Geographic Scope of the Duopoly Rule

The Commission first adopted broadcast duopoly rules in 1964, prior to which it evaluated ownership of stations with overlapping contours on a case-by-case basis. *Multiple Ownership*, 45 FCC 1476, *recon.* 3 RR 2d 1554 (1964). At that time, the Commission proposed to bar only overlapping television Grade A signals, but in the final rule changed it to bar Grade B signal overlaps as well. In the *Second Further Notice*, the Commission proposes to change the rule to apply only to situations where one entity owns two stations in the same DMA or two stations in different DMAs whose Grade A signals overlap. NAB urges the Commission to adopt the proposed change to its rules.

As the Commission recognizes, the DMA is the single widely-accepted definition of a television station's geographic market. *Second Further Notice* ¶¶ 14-18. It is the market in which advertising is sold. Nielsen (which establishes DMA boundaries based on historical viewing patterns) uses DMAs to measure and report viewership. DMAs (and the similar ADI market definitions Arbitron formerly provided) are used by the Commission to measure audience reach for purposes of the national television ownership limits. In the Cable Act of 1992, Congress concurred with this view that the area where a station's viewing is dominant is the best indicator of is geographic market when it defined television stations' markets for must carry purposes as their ADI.[3] Particularly in large geographic markets where much of a television station's audience receives its signal from translators or cable systems, the geographic area encompassed by its signal contours bears little relationship to its economic market or service area.

Thus, DMAs provide a useful, widely accepted definition of the geographic market in which a television station operates. While doubtless there are some situations where DMA boundaries inaccurately describe a particular station's market, the Commission can and should address those specific situations through waivers.[4] Waivers are also the best way to address the situation discussed in paragraph 27 of the *Second Further Notice* where a large county may be assigned to one DMA but a station in one part of the county might actually serve viewers in another DMA. Since those circumstances are fact-specific, the Commission should address them on an individual basis.

Further, by allowing common ownership of stations in different DMAs even with Grade B signal overlaps, the Commission may open up efficiencies that will lead to improved service to the public. There efficiencies are similar to the efficiencies associated with larger groups "as well as

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3 *See* Cable Television Consumer Protection and Competition Act of 1992 § 4, P.L. No. 102-385 (1992). In the Telecommunications Act of 1996, P.L. No. 104-104 (1996), Congress amended this provision, in light of Arbitron's discontinuance of issuing ADI maps, to permit the Commission to use, "commercial publications which delineate television markets based on viewing patterns." 47 U.S.C. § 534(h)(1)(C).

4 The Commission also asks (*Second Further Notice* ¶ 19) how it should treat changes in DMA boundaries. In general, DMAs change very little from year to year. If, however, a situation arises where two stations that were in separate DMAs are commonly owned, and the borders of their markets change so that both are in the same DMA, the Commission should not require divestiture, but instead should "grandfather" the existing ownership arrangements. If this situation should arise, it is highly likely that the percentage of the total audience that the two stations would share would be small, and most of their audiences would continue to be separate. Whatever minimal impact on competition might arise would be far less significant than the disruption caused by mandatory divestiture.

efficiencies related to regional news coverage, other regional programming, and regional advertising sales."[5]

The Commission further proposes to apply the television duopoly rule to stations in different DMAs if their Grade A contours overlap. The Commission suggests (*Second Further Notice* ¶ 22) that stations with Grade A signal overlaps may strongly compete with each other for viewers and advertisers. As a general proposition, NAB does not disagree with the Commission's assessment. In applying the rule, however, the Commission should be careful to recognize that there may be situations where two stations have overlapping Grade A contours, but in fact serve very different markets. Two stations in different DMAs that are relatively close geographically might have a small amount of Grade A signal overlap. The percentage of each station's audience that is served by the other station would in almost every instance be small. Thus, even if stations in separate DMAs have a small Grade A overlap, the effect on competition for viewers and advertisers if they were commonly controlled may be insignificant, and the Commission should make clear that it will entertain requests for waivers in those situations.

II. Common Ownership of UHF-UHF and UHF-VHF Combinations Must be Permitted

Although NAB agrees with the Commission that the geographic scope of the television duopoly rule should be changed, that step alone would be an inadequate response to the wholesale changes in the video marketplace that have already occurred and the changes ever more rapidly will occur. Thus, the Commission must also recognize that in a multi-channel

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[5] Economists Incorporated, *An Economic Analysis of the Broadcast Television, National Ownership, Local Ownership, and Radio Cross-Ownership Rules*, May 17, 1995 (filed by ABC, CBS/Group W, and NBC) at 91.

environment, broadcasters can no longer be restricted to being single channel providers. The duopoly rules must therefore be changed to allow ownership of two television stations in a market.

A. Market Changes Require Reconsideration of the Duopoly Rule

The television duopoly rule which bars common ownership of two television stations in a market rests on the assumption that lay behind most of the Commission's multiple ownership rules — greater diversity of ownership is always better. Even if that policy may have served the public interest when broadcasting was the only form of electronic media, the days when the Commission could concern itself solely with competition among broadcasters are long past. A combination of government policy and technological advances have moved us from a shortage of channels to an abundance, and from a world of single channel providers to one where all competitors but one supply consumers with an ever-increasing number of communications options.

The Commission has permitted competitors to television broadcasting to grow without constraints on local ownership. Cable operators have been allowed to acquire "clusters" of systems so that one cable MSO often controls virtually all of the cable systems in a television market. Similarly, with the exception of very limited ownership constraints imposed under the 1992 Cable Act, cable system operators have been permitted to own almost unlimited number of cable program networks that are carried on their systems. Last year, the Commission allowed the Nation's second largest cable MSO and a large cable programmer itself — Time Warner — to acquire Turner Broadcasting, another large cable program supplier. Further, the largest stockholder of the combined entity is TCI, the Nation's largest MSO and the direct owner of yet more cable program services. Thus, cable subscribers in many markets now have their cable systems and a majority of the non-broadcast channels on them effectively controlled by one entity.

Similarly, operators of Open Video Systems may own any number of program channels carried on their systems, which may offer consumers hundreds of channels. DBS companies now also make available hundreds of channels of programming, and their ownership of multiple program channels is not barred.

Every provider of video programming to consumers, other than broadcasters, offers them multiple program channels and may own those program services in addition to carrying them. Further, new competitors for viewers and advertisers arrive in the market almost daily. Broadcasters now or soon will compete also with VCRs, Internet services, wireless cable, LMDS systems and a plethora of other providers of video programming. All of this is in addition to television broadcasters' traditional competitors — radio stations and print media.

These developments affect the Commission's diversity analysis in two ways. First, it is increasingly clear that even a large consolidation of local broadcast ownership could have little impact on competition in the advertising market or in the diversity of viewpoints available to consumers. There are just too many different sources of programming and carriers of advertising for one entity to have any significant effect on competition. Thus, the concerns that the Commission had when most markets had only three or four television channels and a far smaller number of radio stations than exist today simply have no place in the current media market.

Even if the Commission might conclude that there could be a threat to its diversity interests, it cannot achieve its objectives by imposing restrictions on television broadcasters that do not apply to television stations' competitors. Having permitted the growth of multi-channel competitors to broadcasting which are not subject to restrictions on how many program services they can provide in a market, the Commission cannot take the position that only television station operators must be restricted to providing only one channel. Not only would such a policy be breathtakingly unfair, it would also in the long run jeopardize the economic future of free, over-the-air television.

Television broadcasters air thousands of hours each year of original programming. Broadcast networks and local television stations provide hours of news and public affairs programming every day. None of broadcast television's competitors comes even close to matching broadcasting's programming efforts. But, as television broadcasters face ever more competing program services, they will no longer be able to acquire new high-quality programming or to provide their present levels of news and public affairs programs. If local television's are to continue to provide universally available service to their communities, they must be able to maintain a viable economic foundation in the face of new competition.

Thus, it is time for the Commission to reexamine its diversity policies. As we now explain, Congress in the Telecommunications Act also recognized that the new video marketplace requires the Commission to change its duopoly rules.

B. Congress Clearly Intended That the Duopoly Rule be Modified

Section 202(c)(2) of the Telecommunications Act requires the Commission to conduct a "rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market." Although Congress did not direct the Commission to adopt particular rules, there can be no doubt that Congress did not intend for the rulemaking proceeding it mandated to be an empty exercise; it clearly expected that the Commission would make changes in the television duopoly rules. The Conference Report is to the same effect. In discussing the required rulemaking proceeding, the conferees stated that it was their intention "if the Commission revises the multiple ownership rules, it shall permit VHF-VHF combinations only in compelling circumstances." H. REP. NO. 458, 104th Cong., 2d Sess. 163 (1996). This language indicates that the conferees expected the Commission to make changes in its rules and expressed their views as to the limits of those reforms.

The debate on the conference bill confirms it was Congress' intention that the television duopoly rules should be substantially revised. Senator Inouye pointed out that "[t]oday's local marketplace is characterized by an abundance of media outlets that were not present or contemplated when the [duopoly] rule was last revised, and the FCC should take this development into consideration. This new competition . . . threatens the very viability of free, over-the-air programming." 142 CONG. REC. S706 (daily ed. Feb. 1, 1996). Senator Ford told the Senate:

> "in the last 32 years, the local media have gained so many new competitors that I have begun to question whether the duopoly rules still promotes good policy. . .. I believe that we may have reached the point where the viability of free, over-the-air programming, provided by single-channel broadcasters, may be threatened by the new multi-channel competitors. . .. It is my hope that the FCC will examine this matter thoroughly and revise the duopoly rules appropriately." *Id.* at S705.

In the House, Congressman Fields, the Chairman of the Telecommunications and Finance Committee and a principal sponsor of the conference bill, engaged in a colloquy with Representative Stearns. They agreed as follows:

> "Since the [duopoly] rule was last revised, the local media marketplace has undergone a breathtaking transformation. This has been characterized not only by a large increase in the number of broadcast stations . . . but more significantly by an onslaught of new multichannel rivals to traditional broadcasters. . .. It is agreed that, when it considers revision of the duopoly rule pursuant to this conference report, the FCC should give serious weight to the impact of these changes in the local television marketplace — changes which have left broadcasters as single-channel outlets in a multi-channel marketplace." *Id.* at H1164.

Congressman Stearns also stated that "the FCC should waive or eliminate the duopoly rule where the proposed combination involves at least one UHF station and there is no demonstration of harm to competition or diversity of voices in the market." *Id.*

Congress, therefore, understood the enormous changes that have occurred in the video marketplace. It told the Commission that the premises on which the duopoly rule were based have eroded and it expressed its intent that the Commission change the duopoly rule to ensure that local television stations can continue to play a vital role in their communities.

C. The Commission Should Allow UHF-UHF and UHF-VHF Combinations

The Commission seeks comment on whether it should change its duopoly policies, either by rule or by waiver. The Commission should allow greater levels of common ownership of television stations within markets, and it should do so by rule. If the Commission allows common ownership only by waiver, it will needless expend its resources and the resources of applicants in processing waiver petitions and it will create uncertainty. The Commission should instead establish a general policy by rule, recognizing that it should continue to examine particular transactions as they are proposed to determine whether they might harm the public interest.

The Commission asks whether it should continue to treat UHF stations differently in analyzing duopoly issues. *Second Further Notice* ¶¶ 33-34. The Commission has long recognized that UHF stations are generally weaker competitors in a television market. Their signals do not reach as far as VHF stations. Although the situation has changed somewhat in recent years, in markets with a larger number of VHF stations, the UHF stations are typically not affiliates of the three established networks. As discussed above, the conference report on the Telecommunications Act also reflects Congress' judgment that VHF stations typically are the strongest in a local market. Thus, the Commission should continue to recognize that ownership of UHF and VHF stations will generally different have impacts on competition and diversity.

The Commission, therefore, should maintain its general bar on ownership of two VHF stations in one market.[6] With respect to combinations that involve at least one UHF station, the rules should be amended to permit common ownership in one market unless the specific circumstances of a proposed transaction show that it would harm the public interest.

Permitting ownership of two stations in a market where at least one of the two stations is a UHF will strengthen competition in the market and add to the diversity of programming available to consumers. A weak and under-financed UHF station adds very to competition. It

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6 We note, however, that in the Senate debate on the Telecommunications Act, a colloquy between Senators Inouye and Hollings pointed out that the general bar on VHF-VHF co-ownership contemplated in the conference report should not apply to Hawaii where, due to the absence of adjacent television markets, most televisions stations operate in the VHF band. Senator Hollings agreed that "[m]any of our concerns about combinations involving two VHF stations in local markets in the continental United States do not apply to Hawaii. The FCC should recognize this distinction when considering the duopoly rule." 142 CONG. REC. S705-06 (daily ed. Feb. 1, 1996). Similarly, if stations can demonstrate that the concerns Congress had about VHF-only combinations do not obtain in a particular market, the Commission should permit waivers of the rule in those circumstances.

may not be able to afford to produce or acquire attractive programming. It may have only a small sales force. These stations often also have inferior studio and transmission equipment. If they are combined with another station, they can become a stronger competitive force. The combined entity may have greater resources and can attract better programming. The combined sales staff will be larger and better able to seek out advertisers. By sharing studio and other equipment, the combined entity can improve the transmission and other technical resources of the UHF station. Thus, while on their own many UHF stations may add very little to the competition in a local market, in combination with another station they can be a strong competitive force. We discuss specific examples of the beneficial effects of common ownership in Part IV of these comments dealing with local marketing agreements (LMAs).

Diversity in the market is also likely to be enhanced by UHF-UHF and UHF-VHF co-ownership. Many UHF stations that have been operated under LMAs have for the first time been able to air news programs. Combinations of stations that enhance the economic foundation of local broadcasters will result in greater levels of program service to consumers. Providing more programming choices to consumers, particularly those who do not subscribe to cable, will give them more choices. The Commission should conclude that increasing quality programming choices, even if two stations are commonly owned, is more likely to add to consumer welfare than weaker program choices provided by individually owned stations.

The Commission also asks for comment (*Second Further Notice* ¶ 41) on whether it should allow acquisition of failed or failing stations by other stations in the same market, regardless of whether that combination would otherwise be permissible. From the point of view of both competition and diversity interests, there can be no dispute that having two operating stations is better than only one, even if the two stations share ownership. Moreover, the Commission should allow applicants to take advantage of this exception if they can show that the station to be acquired has consistently lost money and is headed for failure, rather than limiting the exception to situations where stations have already failed and service to the public has either been suspended or reduced.

The Commission also asks whether it should permit ownership of two television stations only in larger markets or impose some other limitation such as a maximum combined market or audience share. There is no need for the Commission to construct any "bright line" test for a revised duopoly rule. Even in relatively small markets, sources of video programming other than local television stations abound and there are numerous competitors in the advertising market. NAB recognizes, however, that there will be some markets and some proposed combinations of stations where the particular circumstances of the transaction may present a risk to the public interest. The Commission should address those situations on a case-by-case basis, rather than by attempting to establish and *a priori* test that may prove inappropriate in many circumstances. By looking at the specific facts of each market, the Commission will be able to reach an appropriate conclusion about the level of competition that will exist for the stations proposing co-ownership.

The television duopoly rule has been in place for more than three decades. The television market today, however, is unrecognizable from the that of 1964. Having encouraged the development of multichannel competitors to broadcasting, none of which are subject to local ownership restrictions, the Commission must revise its duopoly rule to permit television broadcasters to compete in the new marketplace.

III. The One-to-a-Market Rule Should be Repealed

In the Telecommunications Act, Congress also directed the Commission to reconsider the one-to-a-market rule that generally bars radio-television cross-ownership in a single market. The Commission in 1989 instituted a waiver policy for larger markets,[7] but it has not revised its policies since the changes in the radio duopoly rules it made in 1992 and Congress extended in the Telecommunications Act.

Although Congress only required the Commission to extend the waiver policy, the Commission (*Second Further Notice* ¶ 64) asks if the rule can be eliminated "because the respective radio and television ownership rules alone can be relied upon to ensure sufficient diversity and competition in the local market?" NAB strongly supports elimination of television-radio cross-ownership restrictions which burden the Commission, impose often erratic costs on broadcasters, and result in no meaningful public interest benefits.

The one-to-a-market rule has always rested on a fragile foundation. It was first adopted in 1970 by a closely divided Commission. *Multiple Ownership*, 22 FCC 2d 306 (1970), *recon.* 29 FCC 2d 662 (1971). Even at that time, Chairman Burch concluded that, "[t]he plain fact is that the Commission has labored over 2 years, received reams of comments, heard extensive argument, only to bring forth a rule which applies to areas of ownership least needing attention, if at all." 22 FCC 2d at 335 (Chairman Burch, concurring and dissenting). The sole rationale presented for the rule was the maximization of diversity of ownership. Even that Commission

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7 *Broadcast Multiple Ownership Rules*, 4 FCC Rcd. 1741, *recon.* 4 FCC Rcd. 6489 (1989).

quickly realized that it had gone too far and amended the rule on reconsideration to permit acquisition of AM-FM combinations.

In 1989, the Commission made clear that it no longer believed that maximizing diversity of ownership was its primary objective: "we continue to recognize that economic competition and diversity of programming and viewpoints are not the only goals, and diversity of ownership is not the only consideration, in the licensing of broadcast stations in the public interest."[8] Since then, both Congress and the Commission have concluded that increased consolidation of radio ownership serves the public interest. In 1992, the Commission revised the radio duopoly rule to permit ownership of multiple radio stations within a market. *Revision of Radio Rules and Policies*, 7 FCC Rcd. 2755 (1992). Section 202(b) of the Telecommunications Act required the Commission to amend the radio duopoly rule even further to allow ownership of up to eight radio stations in larger markets and expanded ownership even in very small markets.

It is clear, therefore, that the goal of maximizing ownership diversity on which the one-to-a-market rule rests no longer can be viewed as advancing the public interest. The Commission as a result should determine that there is no reason to retain the rule.

In practice, the radio-television cross-ownership rule does not appear to achieve any public interest objective. Because existing combinations were grandfathered when the rule was adopted, the Commission is faced with numerous requests for waivers when any of those stations are transferred. While the Commission has frequently permitted grandfathered combinations to be transferred, the need to seek a waiver burdens both licensees and the Commission which must devote scarce resources to reviewing these applications.

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8 *Id.*, 4 FCC Rcd. at 1742.

Further, in light of the changes in the radio duopoly rules, the one-to-a-market rule has anomalous effects on local markets. A licensee who owned only radio stations or a new market entrant can take advantage of the new rules and acquire up to eight radio stations. But even if an owner only has one radio station and a television station in the same market, it is barred from acquiring any more radio stations. Further, a radio licensee cannot consider buying a television station, although there may be substantial efficiencies to be obtained through joint newsgathering and sales efforts.

Congress concluded that competition and diversity would not be adversely affected if one owner could operate up to eight radio stations, and we have discussed why the Commission should also permit ownership of two television stations in a market. The revisions to the duopoly rules will make it possible for broadcasters to operate more efficiently. If it is in the public interest for broadcasters to realize those efficiencies, it also is in the public interest to permit common ownership of radio and television stations if licensees believe that they can operate most efficiently under that arrangement.

Finally, the Commission need not worry about the effects on the local advertising market of eliminating the one-to-a-market prohibition. Evidence continues to mount that radio and television stations vigorously compete with each other as well as with other local media, most particularly with newspapers. Given the large number of radio stations in most markets, as well as the prevalence of newspapers, outdoor advertising providers, yellow pages, and local cable systems, there are few, if any, areas where radio-television cross-ownership could have anti-competitive effects on the local advertising market.

Moreover, by allowing radio-television combinations, the Commission would permit stations to obtain a host of efficiencies that would benefit the public. In particular, news departments would be strengthened with the ability to use the same reporters, newsgathering equipment, and other staff to provide information over both media.

Modifying the rule or changing the Commission's waiver policy would place the Commission in the position of trying to write a rule to deal with complex and varying market conditions. As the Commission notes (*Second Further Notice* ¶ 69), the Court of Appeals in *WSB, Inc. v. FCC*, 85 F.3d 695, 701 (D.C. Cir. 1996), has already questioned the rationality of limiting the existing waiver policy to ownership of only one radio station in each service. Rather than trying to weigh the effect of various combinations of station ownership configurations and market conditions, the Commission should conclude that the duopoly rules for radio and teleivison are fully adequate to ensure that there will be competition and diversity in local markets and that there is no need to retain an additional cross-ownership rule.[9]

IV. The Commission Should Grandfather Existing Television LMAs

In the event that the Commission does not change its television duopoly rule, or the changes it adopts would not permit some existing television LMAs to be converted to ownership, the Commission should grandfather these arrangements. Television LMAs have improved service to the public in many markets. Stations which have made often substantial investments in

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9 If the Commission decides to retain the one-to-a-market rule, it should extend the existing waiver policy to smaller markets as Congress directed. Recognizing the impact of increased radio ownership and the fact that there are fewer stations in smaller markets, the Commission should then reduce the number of independent "voices" that it requires for the rule to be waived.

improving the facilities and programming of a station they program under an LMA should not have their investments terminated. Thus, the Commission should permit existing LMAs to continue in effect, to be renewed, and to be transferred if the brokering station's license is transferred.

As the Commission recognizes (*Second Further Notice* ¶¶ 84-85), section 202(g) of the Telecommunications Act provides that nothing in the Act "shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the rules of the Commission." Although the Commission suggests that this language does not bar it from changing the status of existing television LMAs, the legislative history supports a different interpretation. The conference report states that the Act "grandfathers LMAs currently in existence upon enactment of this legislation." H. REP. NO. 458, 104th Cong., 2d Sess. 163 (1996). The conferees went on to point out the public interest benefits of existing LMAs and that Congress' intent was to make sure that the public was not deprived of those benefits from LMAs that were in compliance with FCC regulations "on the date of enactment." *Id.*

The Commission interprets this language as only requiring it to allow current LMAs to continue for the remainder of their current contract term. It also proposes to limit the transferability of existing LMAs. The Commission's interpretation wholly ignores Congress' use of the term "renewal" in section 202(g). It also is inconsistent with the intent of Congress expressed in the conference report that LMAs that were in compliance with the Commission's rules on the date of enactment should not be disrupted.

The debate on the conference bill confirms that Congress viewed existing LMAs favorably and believed that they served the public interest. For example, Senator Inouye pointed out that "LMAs are innovative joint ventures which enable separately owned stations in the same market to find economies of scale through combined operations. . . . These joint ventures have generated substantial rewards for both competition and diversity." 142 CONG. REC. S706 (daily ed. Feb. 1, 1996). In explaining why the bill grandfathered LMAs, Congressman Stearns stated that they "enable broadcasters to take advantage of the economies of scale and generate synergies that provide more outlets for free and innovative local and other programming. LMAs have enabled new stations to get on the air and struggling stations to stay on the air." *Id.* at H1164. He also told the House that LMAs

> "enable separately owned stations to function cooperatively, achieving significant economies of scale via combined sales and advertising efforts, shared technical facilities and increasing stations access to diverse programming. I'm pleased this legislation recognizes the benefits of LMA's and grandfathers them. By grandfathering LMA's, we are allowing broadcasters to continue to use a tool that has helped them meet the challenges of today and tomorrow." *Id.* at H1165.

The limited grandfathering of existing LMAs proposed by the Commission does not reflect Congress' intent. The language of the Act, of the conference report, and of the floor debates all demonstrate Congress' conclusion that the television LMAs entered into before enactment were an appropriate response to the Commission's outdated duopoly policies; that they served the public interest; and that the investments made in them should not be disrupted.

The Commission's proposal to allow only limited grandfathering of existing LMAs is not only inconsistent with Congressional intent, it also fails to take into consideration the substantial investments that have been made in LMAs by broadcasters and the benefits that the public has derived from those investments. For example, as recently reported in *Broadcasting & Cable*, an LMA in Ft. Myers-Naples, Florida resulted in construction of expanded studio facilities for both stations. For the first time, both stations are now able to air 11 p.m. local newscasts, and they have acquired the only Doppler radar in the market, improving viewers' access to accurate weather information. *See* "Are two stations better than one?" *Broadcasting & Cable* (Feb. 3, 1997) at 5.[10]

The LMAs operated by LIN Television also show the improved public service that LMAs have made possible. In Austin and New Haven, the LMA allowed new stations to go on the air; indeed the New Haven station's construction permit had been originally issued in 1954 but, prior to the LMA, financing to put the station on the air had not been obtainable. In those markets, LMAs have introduced new competition to the market and provided viewers with more diverse programming options.

The LMAs have also enabled the brokered stations to improve their technical facilities. LIN has constructed or will build new transmission and tower facilities for stations operated under an LMA in Dallas-Ft. Worth, Norfolk, Austin, New Haven, and Grand-Rapids-Kalamazoo-Battle Creek. The new equipment has increased the coverage area of these stations, again providing more competition and diversity in the market. The new towers and studio facilities are designed for conversion to digital television; on their own, it is unlikely that any of the brokered stations

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[10] Notably, although the two UHF stations involved in the LMA are both major network affiliates, they were previously unable to compete successfully against the third affiliate in the market, a VHF station. The experience in Ft. Myers-Naples supports NAB's argument that the duopoly rules should recognize the continued market handicaps of UHF stations, even if some have become major network affiliates.

could have afforded to even begin the conversion process this early. In Grand Rapids, the brokered station has two new ENG trucks for its local news programs that it could not have afforded on its own.

In each of these markets, the LMA has made new programming available. In Dallas-Ft. Worth, the brokered station — KXTX-TV — provided only one-minute news breaks during prime time before the LMA. The volume of news on the station has increased since the LMA and it has been able to provide news coverage not available from any other station in the market, such as live carriage of the O.J. Simpson criminal trial and continuous prime time coverage on non-presidential election nights. In Norfolk, the brokered station previously offered primarily shopping programs. The station now airs a locally produced half-hour public affairs program four or five times each month. It has become an affiliate of the WB network and in 1998 will switch its affiliation to Fox, steps which add to the availability of program choices in the Norfolk area.

The brokered station in Austin is able to provide the only regularly scheduled Spanish-language programming on any full-power station in the market, including a Hispanic community affairs program. The LMA in the Grand Rapids market permitted the brokered station to offer daily and weekend newscasts for the first time, as well as morning news cut-ins.

In Norfolk, the LMA made it possible to offer North Carolina and Virginia Senate and House candidates free prime time appearances to discuss their positions. Similarly, in New Haven, the brokered station provided eight half-hour programs on which candidates could appear without charge. Finally, these LMAs increased the amount of sports programming available free, over-the-air to every viewer in the market.

Under the Commission's grandfathering proposal, the millions of dollars that LIN and other brokering stations have invested in improved facilities and programming would be placed at risk, particularly since the permitted grandfathering term would be established only by the length of the pending LMA contract. It makes little sense to require the dissolution of substantial economic relationships that have benefitted the public, particularly where the impact on the investment will be determined by the expiration of an agreement made long before the Commission's decision.

The Commission has consistently concluded that it should avoid adopting regulatory policies that result in disruption of investments in broadcasting. *See, e.g., Multiple Ownership*, 50 FCC 2d 1046, 1078, *recon.* 53 FCC 2d 589 (1975), *aff'd sub nom. National Citizens Committee for Broadcasting v. FCC*, 436 U.S. 775 (1978)("stability and continuity of ownership do serve important public purposes"); *see also Central Florida Enterprises, Inc. v. FCC*, 683 F.2d 503 (D.C. Cir. 1982). The broadcasters who entered into LMAs did so in good faith, and the Commission has long been aware of these arrangements. Without a clear showing that specific LMAs are adversely affecting competition or diversity, it would be inappropriate to impose a general rule terminating LMAs that are not permitted under the revised duopoly rules.

Further, doing so would risk losing the public interest benefits that LMAs have provided. Most, if not all, of the brokered stations were financially precarious as stand-alone operations. Since the level of competition in local video markets is increasing, there is little basis to believe that if they are detached from the brokering station that they can continue this high level of public service.